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Section III:

Proposed Guidelines for Custody and Visitation for Cases with Domestic Violence

High-Conflict and Violent Parents in Family Court:

FINDINGS ON CHILDREN'S ADJUSTMENT, AND
PROPOSED GUIDELINES FOR THE
RESOLUTION OF CUSTODY
AND VISITATION DISPUTES

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INTRODUCTION

DEVELOPMENT OF THE GUIDELINES

The following guidelines for the disposition of custody and visitation disputes where there has been domestic violence between parents were developed through a process of community involvement and dialogue among concerned professionals and administrators of public and private agencies. The goal of this process was (a) to review relevant research findings in order to specify the problems to be solved, (b) to develop consensus about the principles that should guide any intervention, (c) to propose specific strategies for resolving the problems, and (d) to discuss the pragmatics of instituting the proposed changes in court policies and procedures.

As the guidelines were drafted, representatives from two domestic violence agencies within the two counties where the study reported in Section I was conducted were consulted regularly. These agencies were the Marin Abused Women's Services and the San Mateo Battered Women's Services. In addition, information about other states' laws, policies, and procedures were obtained from Battered Women's Coalitions in seven states (Alaska, Arizona, California, Colorado, Minnesota, Pennsylvania, and Texas), the National Clearing House on Women and Family Law (New York City), and the Draft Report of the California Judicial Council Advisory Committee on Gender Bias in the Courts, as well as numerous concerned professionals across the U.S. (women's advocates, attorneys, judges, mental health professionals, researchers, journalists, and activists). See the Appendix for a summary of the different states' current provisions in the law with respect to domestic violence and custody.

The Northern California Ad Hoc Committee on Domestic Violence was also solicited for its input. This committee has had a core and shifting membership over the past three years with representatives from California family courts (primarily mediators), the Senate Office of Research, and the Statewide Office of Family Court Services, as well as concerned professionals (family law attorneys, law educators, and mental health professionals specializing in domestic violence). During September and October 1991, the committee sponsored a working seminar to develop broad-based principles and procedures for family court service intervention in domestic violence cases, and specifically devoted part of this working seminar to develop these guidelines for custody and visitation.¹ Representatives from 11 counties attended this seminar, many of whom were the administrative heads of their local family court services: Alameda, Contra Costa, Marin, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma.

A draft of the guidelines was then circulated at a meeting in November 1991 of Family Court Services directors from all counties in California, with a request for feedback and further suggestions from their respective local offices. A total of 15 responses were received. The final draft was then prepared, after taking into account the feedback from both Family Court Services offices and

¹ Both the Southern and the Northern Ad Hoc Committees on Domestic Violence have proposed guidelines for principles and procedures to be used by staffs of Family Court Services to *identify, assess, and deliver services* to families in which domestic violence has occurred. These other guidelines should be seen as complementary to the ones proposed here, which focus on the disposition of custody and visitation in disputed cases. To the best of our knowledge, there are no other guidelines in California, nor in the rest of the country, that provide the kind of detailed proposals about custody and visitation that are made here.

our consulting domestic violence agencies, Marin Abused Women's Services and the San Mateo Battered Women's Services. While the final draft attempts to bring together a core consensus among the different agencies and concerned professionals, not all suggestions were incorporated, and some differences of opinion remain. The guidelines, therefore, reflect a collaborative process. Nonetheless, the author of this report takes final responsibility for the material included.

RESEARCH, COMMUNITY VALUES, AND LEGAL BASE

Statements designated as *premises* in the guidelines that follow are based upon the general body of empirical and clinical research findings discussed in Sections I and II of this report. Statements designated as *principles* are supported by research to varying extents, but they also reflect values held by the community of concerned professionals as well as commonly held conceptions about how to help children and families in domestic violence situations. Statements designated as *specific recommendations* are strategies proposed and used by experts in the field (Family Court Services workers, custody evaluators, therapists, women's and children's advocates, etc.). They have not yet been evaluated empirically as effective methods of solving the problems specified in this report.

Existing laws relevant to specific statements in the guidelines are referenced in the text. Current California laws and uniform standards of practice for court-connected child custody mediation relevant to domestic violence are provided in a separate document by the Statewide Office of Family Court Services. These proposed guidelines are intended to supplement and do not contradict any current law or uniform standard.

The guidelines are based on existing knowledge about domestic violence, which is quite limited; therefore, they will change as more is learned. They are also meant to be employed together with good clinical judgment and wise judicial discretion with respect to individual cases, and are to be interpreted in the context of the research findings described here and elsewhere.

INTENDED USE OF THE GUIDELINES

These proposed guidelines were prepared for use by court-connected Family Court Services mediators working with families to arrive at custody agreements. In this arena, they comprise background information that the mediator can provide to parents who are trying to reach their own settlement. The guidelines should also help guide the recommendations of court-connected evaluators conducting custody investigations, and may assist judges who must at times make judicial decisions on behalf of disputing parents. Finally, the guidelines should also be made available to the community at large, especially those concerned about domestic violence, to provide information on general policy, increase accountability of the family courts and services to the public, and elicit comments and an ongoing dialogue about these matters.

DEFINITIONS

1. Domestic violence is the use of physical force, restraint, or threats of force to compel one to do something against one's will or to do bodily harm to self, cohabitant, or family member, or the mother or father of one's child. It includes but is not limited to: assault (pushing, slapping, choking, hitting, biting, etc.); use of or threat with a weapon; sexual assault; unlawful entry; destruction of property; keeping someone prisoner or kidnapping; theft of personal property; and infliction of physical injury or murder. Psychological intimidation or control may also be maintained through such means as stalking, harassment, threats against children or others, violence against pets, or destruction of property.

(This definition is broader than but inclusive of definitions used for an offender of domestic violence in California Penal Code section 273.5 and for an offender of stalking in California Penal Code section 646.9.)

2. Indication of violence may include but is not limited to police reports, medical reports of injuries, third-party witnesses, domestic violence expert witnesses who interview both parties, self-reports, and audio or video tapes of threats or actual incidents.

(It is understood that most often evidence of physical abuse is not available. However, lack of corroborative data does not diminish the indications of violence available to the mediator/evaluator by way of self-reports from the victim.)

PREMISES

1. Domestic violence is detrimental to children, irrespective of their relationship with the perpetrator of violence. Children who have witnessed or overheard severe or repeated incidents of violence perpetrated by parent(s) are likely to be acutely or chronically traumatized and at risk for emotional, behavioral, and social difficulties, including long-term victim or perpetrator roles. Children who do not directly witness spousal abuse are also negatively affected by the climate of violence in their homes and are likely to experience impairment of development and socialization skills. Even very young children and infants who are not thought to be cognizant of the violence are negatively affected. For these reasons, children need to be protected from witnessing threats of violence or actual physical abuse and from exposure to a climate of violence in their homes.

2. Domestic violence is understood to be a behavior or set of behaviors arising from multiple sources, which may follow different patterns in different families, rather than a syndrome with a single underlying cause. Parent-child relationships are likely to vary with the different patterns of violence, and children of different ages and gender are affected differently. There are also different trajectories for recovery and the reconstitution of family relationships and for the potential for future violence. For these reasons, domestic violence families need to be considered on an individual basis when helping them develop appropriate post-divorce parenting plans.

3. Domestic violence can occur in all cultures and ethnic groups. However, the interpretation of what constitutes violence and what is considered normal emotional expressiveness varies greatly among different cultural and ethnic groups. It is important to interpret the meaning of a behavior within its cultural context whenever possible. It is understood that a client may behave in ways that the majority culture views as destructive or psychologically aberrant, but that at the same time may be consonant with the client's native culture. Wherever possible, it is important to provide culturally aware Family Court Services staff who can "bridge" from one culture to another in interpreting domestic violence and helping families make appropriate custody and visitation plans.

PRINCIPLES

1. All decisions about custody and visitation should be based on physically and emotionally protecting the child and preserving or reconstituting those positive aspects of the parent-child and other family relationships to all extents possible. Custody of children is not a reward or compensation for victim status, nor should the denial of custody and restrictions on visitation be used as punishment for the perpetrator of violence.

2. It is recognized that the needs of children do not always coincide fully with the needs of their mothers or fathers who have been physically abused by domestic violence. At the same time, parents need safety from threats, harassment, and/or physical violence in order to adequately provide and care for their children.

DETERMINING CUSTODY AND VISITATION

PHYSICAL CUSTODY AND RESIDENCE

GENERAL PRINCIPLES

1. The absence of violence perpetrated by the parent, and the capacity of the parent to provide a violence-free home for the child, should be given considerable weight in determining timesharing and the child's residence (see Civil Code section 4608). It is important to note that oftentimes domestic violence is perpetrated not by the parents but by significant others, including new boyfriends/girlfriends, new spouses, or extended family, and the potential for violence to occur in this wider domain needs to be considered. It is also recognized that physical custody awards should not be based on any one factor, and that informed clinical judgments are necessary in weighing and taking into account the circumstances of each child and family.
2. Adult victims of repeated or severe incidents of violence may have diminished parenting capacity when the violent relationship is terminated, as a consequence of the victimization. Therefore, prior to long-term decision making regarding child custody and timesharing, the parent who was the victim would need the opportunity to re-establish competence and stability as a resident parent for a period of time, usually with the support and guidance of professional and/or peer counselors.
3. When a victim of violence, for self-protection, leaves the home without the children, it should not establish a status quo in favor of the perpetrator of violence. (It is understood that there are few resources available to parents with children who leave a violent relationship.)
4. The "friendly parent" provision specifies that the parent most willing to provide liberal visitation to the other parent is favored as the physical custodial parent (see Civil Code section 4600(b)(1)). This provision should not apply if it would impair the ability of a parent to act in a child's best interest by protecting the child from witnessing violence.

LEGAL CUSTODY

GENERAL PRINCIPLE

Joint legal custody is generally not appropriate where there is ongoing high conflict and potential for violence between parents, as it usually requires considerable ability to work cooperatively in joint decision making. Legal custody orders that keep the tension and hostilities high or that maintain the risk of further violence are contrary to the spirit and intent of a joint legal custody arrangement. No legal custody arrangement should maintain a high level of continuous parental conflict or hinder the parents' ability to make appropriate and timely decisions regarding their children.

SPECIFIC RECOMMENDATIONS

1. Where there is *indication of both current AND episodic or ongoing threats of and/or use of violence*, sole legal custody should normally be given to the nonviolent parent. In these cases, the noncustodial parent may be denied right of access to the child's medical and educational records if such information would provide access to the custodial address and telephone number, which the custodial parent has the right—for safety reasons—to keep confidential.
2. Where there is a history of domestic violence that is *not* current, nor both recent AND episodic or ongoing, there should be no presumption in favor of any particular legal custody arrangement. The options include but are not limited to the following:
 - (a) An explicit division of legal custody decision-making rights and responsibilities can be awarded to each parent.
 - (b) A court master (arbitrator) can be appointed to help parents make joint decisions under a joint legal custody order.
 - (c) Parents may have joint legal custody provided they both have the capacity to make non-coerced, timely, cooperative decisions for their child, under an arrangement that does not compromise their safety.
 - (d) One parent may be awarded sole legal custody.
3. If it is determined that sole legal custody is appropriate for a particular family, the agreement should reflect the noncustodial parent's legal right to directly receive information concerning the child(ren)'s health, education, and welfare (see Civil Code section 4600.5(1)). The agreement should include a provision whereby the custodial parent must inform the relevant health and educational institutions that the noncustodial parent has the right of access upon request to such information (excluding when appropriate the custodial address and telephone number). The noncustodial parent should also have the authority to consent to medical treatment on behalf of the child in event of urgent injury or illness.

ACCESS/VISITATION

GENERAL PRINCIPLES

1. **Limit child's exposure to parental conflict.** All arrangements for contact between a child and parent should be carefully structured to limit the child's exposure to conflict between the parents and to ensure the safety of all present.
2. **Frequent transitions may not be advisable.** Where there is *ongoing conflict and reasonable fear of violence* between parents, and/or the child shows continued stress reactions to transitions between parents, access arrangements that require the child to make frequent transitions between parents should be avoided.² (In the special case of infants and young children where it may be

² Note that violence may not have actually occurred, but there are threats or other indications that would make a reasonable person fear that it might occur. The available research data support these provisions (Brotsky et al. 1988; Buchanan et al. 1991; Johnston et al. 1989; and Section I of this report).

necessary for more frequent exchanges of the child, special provisions should be made to ensure the comfort and safety of the child and parent.)

3. Substantial amounts of time with both parents may not be advisable. Where there is *ongoing conflict and fear of violence* between parents, timesharing schedules that require the child to spend substantial amounts of time with both parents are not usually advisable. (In the special case where a child appears to need more contact with a same-gender nonresident parent, more visiting time may be appropriate. In this situation, it may also be better for a sibling who is of different gender than the nonresident parent to share the same timesharing arrangement, so that siblings can remain together on visits in order to support one another.)³

SPECIFIC RECOMMENDATIONS

1. Supervised Visitation

Supervised visitation involves the use of a third party to effect the transfer of the child from one parent to the other and to remain with the child throughout the visitation period.

Supervised visitation is recommended where there is indication of current use of or an expressed threat of violence. It is also recommended where there has been both recent violence and episodic or ongoing violence in the past. In these cases, the perpetrator should normally have supervised visitation with the child under the following conditions:

- (a) An explicit court order should detail the conditions of the supervised access. This should include the times for the visits, the places of exchange of the child, whether telephone contact with the child is permitted and under what conditions, who should supervise the visit or how the supervisor is to be chosen, and who should bear the cost of the supervision. (Although it is recognized that the court shall determine who bears the cost of the supervision, it is strongly advised that the parent who has perpetrated violence should normally bear the cost.)
- (b) The supervisor should be a responsible adult who can be expected to provide appropriate supervision for the visitation. In general, the specific supervisor and the role that this supervisor will play during the visits may be agreed upon by both parents or ordered by the court. The supervisor should be someone with whom it is expected that the child will be comfortable. The place of visitation should be one that is expected to feel comfortable, reassuring, and safe to the child.
- (c) The removal of the requirement for supervised visitation should normally be made contingent upon cessation of the threats of or use of violence by the perpetrator for a period of time determined to be appropriate by the court, and, by the order of the court, on the successful completion of an *approved*⁴ course of counseling for the cessation of violence. In general, a minimum of one year of counseling is considered necessary for persons who have repeatedly perpetrated domestic violence.

³ *Ibid.*

⁴ An approved course of counseling refers to courses used by domestic violence offenders in the criminal courts that meet the standards of State of California Assembly Bill No. 907. These standards are currently being considered for legal mandate by the state. Until the standards are mandated, courses should be approved by Family Court Services, and, if available, should be those that work collaboratively with battered women's shelters.

- (d) In the event that supervised visitation under the above terms is determined to be necessary but is not feasible, then the access plan should gravitate toward protecting the child, in which case access with the perpetrator of violence should be suspended until such time that supervised visitation is available or determined to be no longer necessary.

2. Suspended Visitation

Supervised visitation should be suspended for a designated period of time⁵ with a perpetrator of current violence, or with a perpetrator of both recent *and* episodic or ongoing violence, under any *one* of the following conditions:

- (a) Where there are repeated violations of the terms of the visitation order, which adversely affect the child. (This includes occasions when the supervisor of visitation reports that the perpetrator of violence uses supervised time with the child to denigrate the other parent, or to obtain information about the whereabouts and activities of the other parent.)
- (b) Where the child is severely distressed in response to visitation (including refusing to visit with the parent who has been violent) and when these symptoms are not ameliorated despite appropriate professional counseling.
- (c) As in 1.(d) above.
- (d) Where there is clear indication that the violent parent has expressly threatened to harm or flee with the child, or if the offending parent attempts to use the child to communicate threats of physical harm or death to the other parent. Such cases should then be evaluated by either Child Protective Services or Family Court Services and a recommendation should be made to the court on:
 - under what conditions supervised visitations would be resumed, or
 - whether all contact between the child and the offending parent should be suspended indefinitely or permanently terminated.

If the evaluation determines that the indefinite suspension of parent-child contact is appropriate, it should be made very clear in a court order what conditions would have to be met by the offending parent before resumption of supervised visitations would be reconsidered by the court. If the evaluation determines that reinstatement of parent-child contact is appropriate, any "in person" contact should typically begin with supervised visitation.

- (e) If a parent has a history of extreme violence or abusive behavior (i.e., murder, attempted murder, violent sexual assault, severe child abuse/neglect), extreme caution must be taken with regard to the child's contact with the violence-threatening parent. Any parent-child contact should be suspended until such time as an appropriate evaluation is made by a designated agency (Child Protective Services or Family Court Services) to determine under what conditions supervised visitations may occur or if parent-child contact should be permanently terminated.

⁵ The length of time for suspension of visitation should be determined for each case individually. In general, suspension should continue until there is reason to believe the problem no longer exists and, at that time, visitation can resume on a supervised basis. However, it is also important to remember that very young children and infants have difficulty remembering an absent parent, so that prolonged lack of contact may adversely affect their capacity to subsequently attach to that parent. Hence each child's age and current relationship with the perpetrator of violence need to be carefully considered in determining length of suspension of visitation.

3. Temporary Supervision or Suspension of Visitation

Either supervised or suspended visitation may be appropriate for a *brief period*⁶ under either of the following circumstances:

- (a) While there is fact finding with respect to serious allegations of domestic violence.
- (b) While the child is being assessed for serious symptoms of distress and/or reluctance to visit.

Suspended visitation, *for a brief period*, is appropriate following a traumatic episode of violence perpetrated by one parent, when the abused parent and child have sought shelter (e.g., in a battered women's shelter) and need respite. This period of respite should be no less than two weeks.

4. Unsupervised Access/Visitation

- (a) Under an arrangement for access between parents and children where there has been a history of domestic violence but the violence is *not* current, nor both recent and episodic or ongoing (as in the above sections on supervised and suspended visitation), the following provisions should normally be appropriate:
 - The access arrangements should be explicitly stated in court orders (with respect to schedules, times, dates, holidays, vacations, etc.) that can be easily interpreted and enforced by police officers if necessary, and subject to contempt actions if the orders are violated.
 - Telephone contacts initiated by the parents to one another or to the child should be at scheduled times only. The child should have unrestricted access by telephone to both parents.
 - A restraining order should normally be in place preventing the parent who has perpetrated violence from coming near the other parent, including during drop-off and pick-up times with the child. The use of mutual restraining orders is generally appropriate only when there is actual evidence of mutual physical or psychological abuse.
 - Transfer of the child should be at a neutral, safe place, preferably with a third party present.
- (b) *Where there is considerable concern about the parenting capacities of both parents*, and where there is indication that violence has been perpetrated by one or both parties:
 - Temporary custody and visitation awards can be made contingent upon either or both parents obtaining parent counseling, and *approved*⁷ counseling for cessation of the violence. If there is evidence that there are drug or alcohol problems contributing to the violence, then temporary awards should be provisional upon treatment for these problems also. If treatment and/or repeated attempts to improve their parenting skills fail and the children continue to be at risk, referrals should be made to appropriate Child Protective Services.
 - Temporary awards made with these provisos should be subject to appropriate review(s) to ensure compliance with the terms of the agreement and the safety and well-being of the child.
 - It may be appropriate to give more weight in the custody/access decision to providing the child with continuity in relationships with supportive others (such as teachers, peers, grandparents) and stability of place (such as neighborhood and school). A parent's need to make a geographical move in order to obtain economic stability is an exception to this.

⁶ *Ibid.*

⁷ See definition of *approved* counseling in footnote 4.

ASSESSMENT, TREATMENT, AND REPRESENTATION OF CHILDREN

SPECIFIC RECOMMENDATIONS

1. Children who demonstrate symptoms of fear, anxiety, persistent refusal to visit, and other distress in relation to visitation with a parent who is perceived to have perpetrated violence should normally be seen and assessed by Family Court Services workers, or by any counselor, therapist, or advocate who is trained to interview children and who is prepared to talk with Family Court Services. The purpose of this assessment is to hear the child's concerns and recommend appropriate schedules to the court, including safeguards in the visitation plan that help the child feel more safe and comfortable with the arrangement.
 2. Children who express strong wishes to "talk with the judge" and those who write letters and attempt to communicate with the court should normally be given the opportunity to talk to Family Court Services workers or to a legal or mental health counselor who is trained to interview children and who is prepared to talk with Family Court Services. The purpose of interviewing children is to gain a greater understanding of the child's wishes and needs and to provide the child with an opportunity to be heard. It should be made clear to both parents and to the child that the child is not testifying, that a decision about custody and access is not the child's to make, and that the child does not have to choose between parents.
 3. Children who have witnessed severe or repeated incidents of parental violence are likely to be acutely or chronically traumatized and in need of remedial psychological help. Their reluctance or refusal to visit a parent should not be seen as solely induced by an alienating parent. Wherever possible they need to be referred for psychological treatment and each parent (whether victim or perpetrator) is likely to need *separate* collateral parental counseling (see Civil Code sections 4608.1(a) and 4608.1(b)).
 4. It may be appropriate to appoint a guardian ad litem in order to represent the child's interests and concerns during the legal proceedings where there has been domestic violence and where the child is symptomatic or reluctant to visit.
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